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No. 488

IN THE

Supreme Court of the United States

October Term, 1952

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR THE CALLANAN ROAD IMPROVEMENT COMPANY

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WILSON - ERA PRINTING CO. - RE. 7-6005 - WASHINGTON 1, D. C.

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	6
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. The District Court Erred in Failing to Set Aside the Commission's Order on the Ground That Its Action in Revoking or Cancelling the Certificate of Appellant's Predecessor in Interest was Illegal and Void	13
II. The District Court Erred in Failing to Hold That the Commission May Not Modify or Partially Revoke a Certificate Issued to a Wafer Carrier by Incorporating in Said Certificate a Classification of Water Carriers	24
III. The District Court Erred in Failing to Find as a Matter of Law That the Commission Is Not Authorized to Specify the Service to be Rendered or the Type of Equipment to be Used by a Water Carrier	32
IV. The District Court Erred in Failing to Find That the Commission's Orders have the Effect of Revocation or Modification of Section 314 of the Interstate Commerce Act	40
V. The District Court Erred in Failing to Hold That the Commission Did Not Observe the Provisions of Section 8(b) of the Administrative Procedure Act	47
CONCLUSION	52

Table of Cases

Ann Arbor R. Co. v. U. S., 281 U.S. 658	39
Atlanta and St. Andrew's Bay Rwy. v. United States, 104 F. Supp. 193	51

PAGE

Baltimore and O. R. Co. v. U. S., 298 U.S. 349 40
Barrows Common Carrier Application, 19 M.C.C. 179 37.
Billy Baker Common Carrier Application, 24 M.C.C. 805 37
Brady Transfer & Storage Company Extension, 51 M.C.C. 770 31
Campbell Sixty-Six Express, Inc. v. Frisco Transportation Company, et al, 46 M.C.C. 222 29
Campbell Transportation Company, 260 I.C.C. 107 14, 15, 16, 18, 21
Central Truck-Away System, Inc., 17 M.C.C. 713 37
Classification of Motor Carriers, 2 M.C.C. 703 25, 26, 27, 30
Coastal Tank Line, Inc., et al, v. United States of America, et al, No. 2271-50 28
Coastal Tank Line, Inc. v. Charlton Bros. Transp. Co., Inc., 48 M.C.C. 289 ..... 26, 27, 28, 29
Crescent Express Lines v. United States, 320 U. S. 401 ..... 35, 36
Detroit & Cleveland Navigation Company, 265 I.C.C. 506 31
Dixie Carriers, Inc. Rates and Allowances, 278 I.C.C. 417 ..... 43, 46
Eastern Trails, Inc. Common Carrier Application, 42 M.C.C. 21, 25 34
Eastern Transportation Company, 250 I.C.C. 505, 635 14, 15, 18, 21
Foss Launch & Tug Co. Applications, 260 I.C.C. 103 15, 16, 17, 18
Glendenning Motorways, Inc., Interpretation of Certificate, 49 M.C.C. 440 ..... 29, 30
Hudson Bus Transportation Company, Inc., Common Carrier Application, 46 M.C.C. 9 31
Interstate Commerce Commission v. Cincinnati N. O. & T. P. R. Co., 167 U.S. 479 38
Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 41, 46-47 ..... 42, 44
Mercer and Dunbar Common Carrier Application, 13 M.C.C. 683 37
Miiller Extension of Operations, 21 M.C.C. 401 37
Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co., 230 U.S. 247 46
Mutrie Motor Transp., Inc. et al. v. Blue Line Exp., Inc., 53 M.C.C. 530 31
Myers Common Carrier Application, 23 M.C.C. 451 37

PAGE

Nudelman Common Carrier Application, 22 M.C.C. 275 ..... 36, 37
Parcel Delivery Service, Inc., 8 M.C.C. 275 37
Peoria & P. U. R. Co. v. U. S., 263 U.S. 528 39
Smith Bros. Revocation of Certificate, 33 M.C.C. 465, 471-472 42
Smoky Mountain Tours Company, 27 M.C.C. 435 38
St. Louis O'Fallon R. Co. v. U. S., 279 U.S. 461 39
Texas v. Eastern Texas R. Co., 258 U.S. 204 38
Texas & P. R. Co. v. U. S., 289 U. S. 627 39
Tidewater Transfer Company, Inc., Extension, Wines In Bulk, 47 M.C.C. 279 30
Union Pac. R. Co. v. Updike Grain Co., 222 U.S. 215 46
U. S. v. Idaho, 298 U.S. 105 40
U. S. v. Louisiana & P. R. R. Co., 234 U.S. 1 46
U. S. v. Missouri P. R. Co., 278 U.S. 269 39
U. S. v. Pennsylvania R. Co., 242 U.S. 208 38
United States v. Seatrain Lines, 329 U.S. 423, 91 L. Ed. 396 ..... 10, 11, 15, 16, 17, 18, 19, 20, 24, 33, 34, 35
Valley Motor Lines, Inc. v. Western Truck Lines, Ltd., 47 M.C.C. 718 31

Statutes Cited

Section 208(a), Interstate Commerce Act, 49 U.S.C. §308(a) 29, 33, 35
Section 212(a), Interstate Commerce Act, 49 U.S.C. §312(a) 3, 27, 28
Section 304(c), Interstate Commerce Act, 49 U.S.C. §904(c) 25, 33
Section 309(a), Interstate Commerce Act, 49 U.S.C. §909(a) 4, 6, 33
Section 309(d), Interstate Commerce Act, 49 U.S.C. §909(d) 4, 16, 17, 33
Section 314, Interstate Commerce Act, 49 U.S.C. §914 ..... 4, 5, 8, 10, 12, 40, 41
Section 8(b), Administrative Procedure Act, 5 U.S.C. §1007(b) 6, 9, 47, 48

Miscellaneous

Sixty-Sixth Annual Report of the Interstate Commerce Commission (Nov. 1, 1952) 32

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OPINION BELOW

The opinion of the District Court (R. 59-71) is reported in 107 F. Supp. 184.

JURISDICTION

The final judgment of the District Court was entered on September 15, 1952 (R. 78). The petition for appeal was presented and allowed on November 7, 1952 (R. 74). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). Probable jurisdiction was noted on February 2, 1953 (R. 80).

QUESTIONS PRESENTED

Appellant in its assignment of errors and in its statement as to jurisdiction has outlined the questions presented in this case. These questions all involve the statutory authority of the Interstate Commerce Commission to revoke a certificate of public convenience and necessity issued to a water carrier pursuant to the provisions of part III of the Interstate Commerce Act, even though the Commission is not granted this right under the statute. Furthermore, the right of the Interstate Commerce Commission to in effect revoke a certificate by indirect means or to specify the service to be rendered in a certificate issued to a water carrier is also presented for decision. Two additional questions are also presented, one involves the failure of the Commission to adhere to the provisions of section 8(b) of the Administrative Procedure Act and whether or not the Commission may have revoked or modified the provision of section 314 of part III of the act by the enforcement of its order complained of herein. These questions may be stated as follows:

(1) Whether the Interstate Commerce Commission may revoke, in whole or in part, an outstanding certificate of public convenience and necessity issued to a water carrier under part III of the Interstate Commerce Act even though that part does not specifically empower the Commission so to do;

(2) Whether, even in the absence of statutory authority to revoke such a certificate in whole or in part, the Interstate Commerce Commission may accomplish the same result indirectly by incorporating in the certificate by reference or otherwise a classification of water carriers which has the effect of reducing the type of operations the carriers may otherwise perform.

(3) Whether the Interstate Commerce Commission may specify the service to be rendered or the type of

equipment to be used by water carriers operating under certificates issued pursuant to part III of the Interstate Commerce Act, even though this part does not specifically authorize the Commission so to do.

(4) Whether the Commission's order complained of by appellant has the effect of revocation or modification of section 314 of the Interstate Commerce Act, and

(5) Whether the Interstate Commerce Commission has failed to comply with the provisions of section 8(b) of the Administrative Procedure Act in that the Commission and its examiner failed and refused to make required findings and to state reasons or basis upon each finding, conclusion and exception presented by appellant upon material issues.

STATUTES INVOLVED

The pertinent provisions of parts II and III of the Interstate Commerce Act, 24 Stat. 379 as amended, 49 U. S. C. 301, 901 et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., are as follows:

Interstate Commerce Act

Part II

Sec. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated

thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder.

Part III

Section 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect.

(d) Such certificate shall specify the route or routes over which, or the parts to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter,

there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

Sec. 304. (c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

Sec. 314. If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

Administrative Procedure Act

Sec. 8. (b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement or (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

STATEMENT

Appellant is the successor in interest to Joseph R. Hutton, formerly of Kingston, New York, now deceased (R. 16, 21). On May 31, 1941, Mr. Hutton filed an application with the Interstate Commerce Commission under the so-called "grandfather" clause of section 309(a) of part III of the Interstate Commerce Act for authority to continue operating as a water carrier in the transportation of commodities generally. The application was assigned for a formal hearing before the Interstate Commerce Commission and counsel for the Commission and other interested parties appeared and participated (R. 7). After full consideration of the evidence presented by Mr. Hutton in support of his application the Commission issued a certificate and order which became effective on and after October 5, 1942, authorizing operations as a common carrier by water in interstate or foreign com-

merce between points on the Hudson River and other waters not here pertinent (R. 9-10).

Approximately a year and a half thereafter, on March 7, 1944, the Commission on its own motion and without prior notice issued an order reopening the record in the earlier proceeding for reconsideration (R. 10) and simultaneously with the release of this order issued its report on reconsideration. The justification given in the report for this action was that the Commission had not specified the type of vessels to be used by Mr. Hutton (R. 11). Accordingly, the Commission on its own motion superseded and cancelled Mr. Hutton's earlier certificate of July 17, 1942, and in lieu thereof issued an amended certificate which for the first time specified the equipment to be used by Mr. Hutton; i. e., self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels (R. 13-14). This action occurred during the height of World War II and at a time when practically all coastwise shipping had been suspended. Mr. Hutton died January 23, 1945 following a surgical operation in November, 1944. His widow was unable to conduct the business of her deceased husband and thereafter made attempts to dispose of the assets of his estate, including the certificate issued by the Commission (R. 16): Finally, after negotiations, appellant, a New York Corporation incorporated in 1895, filed a joint application with the Commission for the transfer and purchase of Mr. Hutton's certificate (R. 14-21). It appeared that the transferee, appellant herein, was engaged in the production of road-building material and agricultural limestone. Among other corporate powers appellant is authorized by its charter to own and lease vessels and to do a towing business. In 1930 appellant began shipping stone by water with chartered scows towed under contract.

The Interstate Commerce Commission held a formal hearing on the application of appellant to purchase Mr.

Hutton's certificate through his administratrix. The application was opposed by an association of water carriers (R. 15). The evidence showed that appellant informed the Interstate Commerce Commission at the time of this hearing that it would continue to handle its own business with the freight of other shippers intermingled in tows on the Hudson River between, generally, Waterford and New York City (R. 18). The association of water carriers which was protesting the approval of the transfer was composed of members of three classes, including a general towing division (R. 18). Evidence presented by this protestant referred to other towing companies on the Hudson River (R. 17). Since it appeared that appellant did not desire to operate on the New York State barge canal system, the towing companies included in the protesting association appeared to be satisfied (R. 19).

In due course appellant inaugurated service on the Hudson River as the successor in interest to Joseph R. Hutton. It filed a tariff with the Interstate Commerce Commission which became effective on April 17, 1949. This tariff made provision for allowances as are contemplated and authorized in section 314 of the Interstate Commerce Act providing in substance that if the owner of property transported by a water carrier renders any service directly or indirectly the charge or allowance therefor by the carrier shall be published in tariffs filed with the Commission. The tariff of appellant so filed with the Commission provided that if shippers of brick furnished to appellant the scows for the movement of brick, a stated amount would be allowed the shipper for the use of the scow. Certain changes were made from time to time in the level of the rates but the allowance provisions of the tariff continued in effect until ultimately ordered cancelled by the Commission.

On May 11, 1949 a competitor of appellant, The Cornell Steamboat Company, complained to the Commission that appellant was engaged in the service of towage on

the Hudson River and that this service was not authorized by the appellant's certificate. Appellant was of the opinion that its certificate was not limited in any respect as to the type of operations it could perform. This was particularly so because the certificate authorized the use of non-self-propelled vessels (barges and scows) and towing vessels (tugs). Appellant requested a formal interpretation of its certificate by the Commission. In a report and order of Division 4 of the Commisison dated October 18, 1951, (R. 22) as affirmed by an order of the entire Commission dated March 17, 1952, (R. 34) the Commission held that appellant was engaged in a towing operation which it was not allowed to perform because its certificate did not specifically authorize towage (R. 32).

In an action to enjoin and set aside the order of the Commission requiring cancellation of the allowance provisions of appellant's tariff the United States District Court for the Northern District of New York held that the Commission was authorized to revoke the certificate of appellant's predecessor in interest because of an obvious legal ambiguity and because appellant's predecessor in interest did not object to the Commission's action. The Court held, however, that it preferred to predicate its decision on the broader ground of the Commission's power to classify water carriers (R. 65). The Court did not, however, pass squarely on the question of whether the Commission could incorporate a classification of water carriers in an outstanding certificate which would have the effect of a partial modification or revocation and neither did it pass on the question of whether the Commission could as a matter of law specify the service to be rendered or the equipment to be used in a water certificate. The Court did hold that the Commission had not overstepped its power regarding the allowance provisions of the act and that its order was not in violation of section 8(b) of the Administrative Procedure Act (R. 70).

SUMMARY OF ARGUMENT

The primary points relied on by appellant are (1) that the Commission may not directly or indirectly revoke an outstanding certificate of a water carrier and (2) that in any event the Commission is precluded from restricting appellant's operating authority by prescribing, or by specifying the service it can perform or the equipment it can use. Two subsidiary points involve the statutory power of the Commission to in effect revoke the provisions of section 314 of the Interstate Commerce Act (49 U. S. C. 914) and whether or not the Commission and its examiner failed to comply with the provisions of section 8(b) of the Administrative Procedure Act (5 U. S. C. 1007(b)).

(1) The *Commission's Lack of Revocation Powers.* In *U. S.* v. *Seatrain Lines,* 329 U. S. 423, 91 L. Ed., 396, this Court held that the Commission is without authority to revoke a certificate issued to a water carrier under part III of the Interstate Commerce Act except where issued by reason of inadvertance, fraud, or mistake. It is apparent that the first certificate issued to the appellant's predecessor in interest was not so issued. The certificate was issued after a formal hearing in which counsel for the Interstate Commerce Commission participated. Exceptions were not taken to the report of the Commission by any party to the proceeding including the Commission's counsel. Accordingly, the initial certificate of July 17, 1942 became effective as proposed in the order on October 5, 1942. Appellant's predecessor did not restrict the scope of authority requested in his application to a particular type or classification of service with the use of a particular type or class of equipment. The certificate was issued as requested and authorized operations as a common carrier in the transportation of general commodities.

The District Court held, however, that this certificate contained an "obvious legal ambiguity" (R. 65). As will be indicated later in this brief, there was no ambiguity in the certificate. The Commission's act was directed solely to an effort on its part to incorporate in the certificate a policy which it had announced a few months before as to the distinction between a freighting operation and a towing operation. The same effort was made by the Commission in the *Seatrain* case, and this Court refused to uphold the Commission on the theory that it was attempting to incorporate a new policy in an outstanding certificate rather than correct an error. The District Court also justified the Commission's action in revoking the earlier certificate of appellant's predecessor in interest on the ground that no objections were made. Appellant contends that failure to object does not confer jurisdiction on an administrative agency to do an act which would otherwise be illegal or unlawful.

In addition to the foregoing, the authority of the Commission to effect *indirectly* a revocation of an outstanding certificate by incorporating therein a classification of water carriers is presented for determination. The District Court predicated its decision on the power of the Commission to make classifications of water carriers (R. 65, 70). Appellant does not dispute the existence of this general power but it does contend that such power can not be used to curtail the scope of a certificate already outstanding. Otherwise, the Commission could use this technique to acquire and exercise powers of revocation not conferred on the Commission.

(2) The *Commission's Lack of Authority to Specify Services or Equipment.* The District Court did not come to grips with the question of whether or not the Commission could specify the service to be rendered by a water carrier or the equipment to be used by a water carrier. This Court held in the *Seatrain* case that the Commission

is not authorized to specify the service to be rendered by a water carrier. This is a second ground of distinction between the Commission's authority under part II of the act applicable to motor carriers and under part III of the act applicable to water carriers. Since the Commission does not have the right to specify the service to be rendered under part III, it does not have the right to restrict appellant's operations to particular types of vessels. The decisions under part II are clear that the right to specify equipment stems from the right to specify services. Since the latter basic right is not conferred under part III, it follows that the subsidiary right to specify equipment is also lacking under that part. Accordingly, since the Commission may not restrict appellant's operations to the use of non-self-propelled vessels with separate towing vessels (*not* a definition of towage), appellant is free to engage in any type of common carrier service, including towage.

(3) *Subsidiary Points.* Appellant's fourth and fifth points concern the failure of the Commission to observe the requirements of section 8(b) of the Administration Procedure Act and the effect of the Commission's order as resulting in modification or revocation of the allowance provisions of section 314 of the Act because of the impossibility as a practical matter of compliance with its requirements.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FAILING TO SET ASIDE THE COMMISSION'S ORDER ON THE GROUND THAT ITS ACTION IN REVOKING OR CANCELLING THE CERTIFICATE OF APPELLANT'S PREDECESSOR IN INTEREST WAS ILLEGAL AND VOID.

As noted, appellant's predecessor in interest was issued a certificate by the Commission on July 17, 1942, which became effective and in force from and after October 5, 1942. This certificate authorized appellant's predecessor in interest to operate as a common carrier by water in interstate or foreign commerce in the transportation of commodities generally between specified points on the Hudson River and points on the New York State Barge Canal including the Oswego branch and the Niagara River. This certificate did not specify the type of equipment appellant's predecessor was authorized to use nor did the certificate classify the type of service appellant's predecessor was authorized to render other than as a common carrier. This certificate was issued by the Commission after a full and complete hearing in which counsel for the Interstate Commerce Commission as well as counsel for other parties appeared and participated. Petitions or other pleadings in the nature of an appeal were not filed by any party to the proceeding, and, accordingly, the certificate in question became effective and in force on and after October 5, 1942. For the reasons which will be explained shortly, the Commission, by order dated March 7, 1944 and on its own motion, reopened the proceeding and simultaneously with the release of this order, a report on reconsideration was issued by the Commission. Attached to the report was an amended certificate and order which cancelled and superseded the

certificate and order dated July 17, 1942. It was stated in the report on reconsideration that the prior report did not specify the type of vessels to be used by appellant's predecessor but it is apparent that the real reason for the Commission's action in this regard was to incorporate for the first time a new policy which had been announced on December 14, 1943, or three months earlier.

The District Court held that the Commission could act "to correct a certificate having the obvious legal ambiguity of the first Hutton certificate" (107 F. Supp. 188; R. 85). This conclusion does not appear to be supported by the record. The purpose of the revocation or cancellation of the earlier certificate was an effort on the Commission's part to incorporate a new policy or doctrine which had been established for the first time on December 14, 1943; i.e., that a carrier whose certificate does not specifically authorize the performance of towage is without authority to engage in this type of service. Prior to the decision of the Commission in *Campbell Transportation Company*, 260 I.C.C. 107, decided December 14, 1943, the Commission held that separate authority to tow shippers' barges in the transportation of commodities generally under part III of the act was not necessary. This decision was rendered in *Eastern Transportation Company*, 250 I.C.C. 505, 635, in which it was concluded by the Commission that:

> "Authority to perform such transportation does not limit applicant to the use of its own non-self-propelled vessels, and the authorization should not be interpreted as forbidding the use of other barges or scows in the transportation. In order to effectuate a flexible and coordinated transportation system, carriers of this type should be able to use non-self-propelled vessels which are chartered from others, interchanged with other carriers, or owned by shippers".

Later, however, the Commission reversed its decision in the *Eastern* case by concluding in the *Campbell* case that towage and freighting operations are different types of services and carriers whose certificate did not specifically authorize towage are without authority to engage in that type of service. This decision was the reason why the Commission cancelled or revoked the earlier certificate of appellant's predecessor on March 7, 1944, and substituted in lieu thereof a certificate which was designed for the purpose of distinguishing a freighting service from a towing service.

Appellant contends that the action of the Commission in cancelling or revoking the certificate of its predecessor was improper and void because the Commission is not authorized under part III of the Interstate Commerce Act to revoke a certificate issued to a water carrier. Furthermore, the action of the Commission in this case is in conflict with the holding of this Court in *United States* v. *Seatrain Lines*, supra. The facts in the *Seatrain* case are so remarkably similar to the facts in this case that more than passing consideration is justified. Seatrain Lines filed an application under the so-called grandfather clause of part III of the Interstate Commerce Act (just as appellant's predecessor did in this case). By report and certificate dated July 2, 1942, the Commission found that Seatrain was in bona fide operation as of January 1, 1940 (the grandfather date) in the transportation of commodities generally as a common carrier by self-propelled vessels between New York and New Orleans. This certificate was not questioned by the Commission until its decision in *Foss Launch & Tug Co. Applications*, 260 I.C.C. 103, decided December 18, 1943, or just four days after the *Campbell* case was decided. In the *Foss* case the Commission held for the first time that freight car ferry service is a special kind of transportation not embraced within the term "transportation of commodities generally" by water. Authority to engage

in this type of service according to the Commission's finding must be specifically granted in each case (260 I.C.C. 105). Accordingly, the Commission proceeded to reopen the long closed case of Seatrain Lines and after reconsideration (260 I.C.C. 430) the certificate of July 2, 1942 was ordered cancelled and superseded and a corrected certificate was ordered issued to Seatrain restricted to the transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk.

Up to this point the facts in the *Seatrain* case and in the case of appellant's predecessor are identical. Each was issued an unrestricted certificate in July, 1942, following a formal hearing conducted by the Commission. In both cases the Commission in other proceedings (the *Foss* case and the *Campbell* case) held that a certificate to transport general commodities did not include the right to engage in certain types of services established for the first time in each of those cases. The two policy cases were decided within four days of each other; the *Campbell* case on December 14, 1943 and reported at 260 I.C.C. 107, and the *Foss* case on December 18, 1943 and reported at 260 I.C.C. 103. Thereafter, by order dated January 27, 1944, the Commission reopened the Seatrain case for further hearing and in its order stated the purpose of the further hearing. In this case the Commission issued an order dated March 7, 1944, reopening the proceeding for reconsideration and simultaneously issued a report and amended certificate, thus affording appellant's predecessor no opportunity to contest the order prior to its release.

In the *Seatrain* case the Commission contended before this Court that it could as a matter of law change or limit the earlier certificate. The Commission contended furthermore that it could, under its power to fix "terms, conditions and limitations" as provided for in section 309(d) of the act, exercise this power without effecting a

partial revocation of Seatrain's certificate. This Court, speaking through Mr. Justice Black, disagreed with the contentions of the Commission. While recognizing that the Commission could correct clerical mistakes in a certificate this Court found that the real purpose of the Commission's action was to invoke its new policy announced in the *Foss* case. This Court held therefore that the Commission was without authority to cancel the earlier certificate of Seatrain stating that "the certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress" (329 U.S. 432-433). This decision is based squarely on the proposition that the Commission may not revoke a water carrier certificate.

The legislative history of part III of the Interstate Commerce Act was relied on by this Court in the *Seatrain* case, particularly statements of Commissioner Eastman before the Senate Committee on Interstate and Foreign Commerce. Commissioner Eastman explained that while the power to revoke certificates of motor carriers under part II of the act was essential, such power was not necessary in the regulation of water carriers. It is obvious from this legislative history that the absence of revocation powers in part III was intended by Congress. This Court quite properly, therefore, refused to permit the exercise of such power in the *Seatrain* case either directly, or indirectly under the Commission's power to fix terms, conditions and limitations under section 309(d).

Nevertheless, the District Court in the instant case held that the Commission was authorized to cancel the original Hutton certificate in order to correct an "obvious legal ambiguity" contained therein. The same contention was made by the Commission in the *Seatrain* case before this Court. In the *Seatrain* case, however, this Court pointed out that the Commission did not reopen

the *Seatrain* case for consideration until after its decision in the *Foss* case, wherein for the first time it was held that a certificate to carry commodities generally did not authorize water carriage of loaded or unloaded freight cars (329 U.S. 429). "Thus it seems apparent [this Court said] that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the Foss case." This Court supported its conclusion in that regard by the fact that the Commission had affirmatively rejected an earlier contention that Seatrain's vessels could be classified as "car-ferries" and instead had concluded that they were ocean-going vessels.

In respect of the instant case it should be noted that the Commission had concluded in the earlier *Eastern* case that specific authority to tow shipper's barges was not required. Therefore, a carrier having the right to transport general commodities could indulge in all types or classes of water carrier operations. Appellant respectfully submits that the Commission's cancellation of the earlier Hutton certificate was for the sole purpose of discarding the policy enunciated in the *Eastern* case and instead applying the new policy announced to the appellant's predecessor in the *Campbell* case. Appellant further submits that this purpose, rather than that of correcting a mere error, is equally as clear here as this Court found it to be in the *Seatrain* case. Accordingly, there is no authority to support the Commission's action complained of herein and its order that appellant is engaged in a towing operation not authorized by its certificate should be vacated and set aside.

It is apparent that the District Court's rejection of appellant's position was also based on the proposition that appellant should not be authorized to engage in a towage operation in the future which it or its predecessor had not in fact conducted in the past. Appellant con-

tends, however, that the District Court erred in this regard because this very argument was rejected by this Court in the *Seatrain* case.

In the *Seatrain* case the Commission endeavored to restrict Seatrain's operating authority to a car-ferry service, notwithstanding the fact that such water carrier had since the grandfather date held a certificate of public convenience and necessity to carry commodities generally. The record in that case discloses that Seatrain had not in fact operated in the latter capacity prior to the grandfather date of its certificate. This Court, however, held that Seatrain could not be deprived of its authority to supplement its car-ferry service then in operation with the general common carrier type service proposed to be inaugurated by the carrier.

Thus it is apparent that the holding in the *Seatrain* case is clear precedent for a similar holding herein. Actually the District Court's contrary viewpoint grew out of its *erroneous* observation that Seatrain had "carried commodities generally" prior to the grandfather date. This finding is plainly contrary to the undisputed evidence of record before the Commission in the *Seatrain* proceeding, as reflected in the Commission's finding on this point:

> "the record shows that in the transportation of commodities generally by self-propelled vessels, all traffic, other than liquid cargoes in bulk and empty railroad cars, handled by applicant, has been transported in railroad cars received from or delivered to rail carriers. Much emphasis was placed by applicant in the several proceedings before us upon the peculiar advantages of the through transportation made possible by its special type of vessel and operations. Applicant, according to the record, limited itself to that class of operations."

Even Seatrain had contended that prior to January 1, 1940 (the grandfather date) it had published and

maintained tariff schedules naming a full line of classification and commodity rates. The Commission rejected this tariff argument as being tantamount to the actual performance of general commodity services, holding that "the mere fact that it participates in such tariffs does not establish that it handled freight by means other than in railroad cars." In short, the *Seatrain* decision is controlling on this point. The action of the District Court is inconsistent therewith and should be reversed.

The second major point relied on by the District Court in justification of its failure to follow the Seatrain decision of this Court was the fact that appellant's predecessor, contrary to Seatrain, failed to object to the Commission's action in revoking the earlier certificate. The Court seems to say that in the absence of objections the Commission may revoke a certificate of a water carrier, whereas if a carrier objects, then, under the doctrine of the *Seatrain* case, the Commission would be denied this right. Appellant respectfully contends that there is no justification for conferring jurisdiction on an administrative agency in this manner when Congress itself has not specifically seen fit to do so.

Further, it should be noted that no warning or opportunity was afforded appellant's predecessor to object to the Commission's action prior to the simultaneous release of an order reopening the earlier record and the release of a report and amended certificate which cancelled or revoked the earlier certificate. The Commission did not state that the purpose of its action was to prohibit or prevent appellant's predecessor from engaging in a towing operation, thereby putting the holder of the certificate on notice as to the exact reason for the Commission's subsequent action. In the *Seatrain* case, however, the Commission issued a notice assigning the application for further hearing. Seatrain was formally advised that its certificate no longer properly described its operations.

The order assigning the application for further hearing stated that the issue involved was whether or not the earlier certificate of July 2, 1942 should be modified so as to limit applicant's operations to the "Seatrain" type of vessel. Thus Seatrain was put on advance notice as to the purpose and reason for the Commission's action. Since Seatrain had been issued an unrestricted certificate it was fully informed as to the purpose of the Commission's action in reopening the case and it was in a position to object.

The facts are very different, however, with regard to the Commissions' procedure in this case. It must be remembered that the Commission itself had vacillated in its policy regarding the necessity of a separate and distinct authorization for towing operations. In the *Eastern* case, it had specifically held that separate towing authority was not required, but in the *Campbell* case the Commission reversed itself and held to the contrary. In the meantime, however, appellant's predecessor, located on the Hudson River and certainly unfamiliar with the technical aberrations which the Commission had seen fit to indulge in, would have been required, if the District Court's opinion on this subject is to prevail, to have exercised a greater degree of skill and regulatory understanding than the Commission itself was exercising during the same period. It was during this period of time that World War II was at its height and domestic shipping had been practically abolished. The Commission's order of March 7, 1944 came at a time when it could have aroused the least excitement as far as Hutton's future operation was concerned. Moreover, after a surgical operation in November, 1944, appellant's predecessor died on January 23, 1945. His widow had had nothing to do with and knew little about the business, and therefore attempted to sell the certificate of her deceased husband (R. 16). These efforts finally culminated in an application to the Interstate Commerce Com-

mission for the transfer and sale of the certificate. The sale was finally approved August 18, 1947 (R. 14), and an amended certificate modified only as to the territorial scope, i.e., the elimination of operations on the New York State Barge Canal System, was finally issued on February 5, 1948 (R. 27). Certainly, under these circumstances, appellant's predecessor should not be criticized, when the Commission itself was uncertain as to the status of towing operations.

The District Court also appeared to rely on appellant's failure to raise any question regarding towage authority when the Hutton certificate was transferred to it. Appellant respectfully submits that in its opinion the facts of record do not support this conclusion. The report of the Commission in *Joseph R. Hutton Certificate Transfer* (R. 14-22) indicates clearly that the protesting carriers were of the opinion that the certificate of appellant's predecessor in interest permitted towing throughout the territory authorized to be served. The protestant, the Northeastern Inland Waterways Association, was described by the Commission as "an association of water carriers having members of three classes, including a division operating on the New York State Canal System and *a general towing division* (R. 18) (Emphasis supplied). In testimony for the association in opposition to the approval of the application mention was made of other carriers having authority to perform towage along the Hudson River (R. 17). The interest of the association was directed primarily to transportation on the New York State Canal System. That business, according to the Commission's finding, appeared to be the protestant's primary concern and its objection to the proposed transfer "would be largely satisfied by limitation of the superseding certificate to the river operation and to the commodities which transferee expects to transport" (R. 19).

Appellant disclosed to the Commission in the proceeding involving the transfer of Mr. Hutton's certificate that it was authorized by its charter to engage in a towing business; that it began shipping crushed stone by water in 1930 with chartered scows towed under contract (R. 17), and that it would continue to handle its own business "with the freight of other shippers intermingled in tows" (R. 18). Under these circumstances it seems very clear that there was no occasion for appellant to consent to a restriction as to the type of service, as distinguished from scope of service, which the certificate authorized. The protesting water carrier association representing towing companies fully understood that the certificate of Mr. Hutton authorized towage on the Hudson River as well as the New York State Canal System. The opposition of this association was directed primarily to a towage operation by appellant on the New York State Barge Canal System because "there now is a dearth of tonnage on the canals" (R. 19). Appellant emphasizes that all parties to the transfer proceeding understood that towage was authorized. Limitation of territory satisfied the opposition of the protestant but this limitation in no way restricted the scope or type of service to be rendered in the remaining territory along the Hudson River. In view of this very clear understanding by all of the parties to the transfer proceeding, appellant respectfully submits that the finding of the District Court that "plaintiffs present attempt to expand its grant is an obvious afterthought stimulated by exigencies with its competition with Cornell" is erroneous. In any event, appellant advances the same contention on this point as was made regarding the question of laches by Hutton—an action otherwise illegal as beyond the scope of statutory authority does not become valid and subsisting merely for want of challenge. Such a theory is clearly contrary to sound governmental administration because it has the effect of encouraging an agency

to exceed its statutory powers if it anticipates no resistance to such action. Moreover, appellant succeeded to whatever rights and privileges existed under the Hutton certificate prior to the transfer, except the territorial modification, and should not be precluded from now trying to validate the authority illegally quashed by the Commission prior to such transfer.

In short, appellant respectfully submits that there is no real or substantial difference between the facts of this case and those of the *Seatrain* case, and that the Commission's action restricting the appellant from towing operations is invalid. Accordingly, the appellant, as the successor in interest, is entitled to a certificate equivalent in scope to that of the original Hutton certificate, subject only to the territorial modification of February 5, 1948.

II

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION MAY NOT MODIFY OR PARTIALLY REVOKE A CERTIFICATE ISSUED TO A WATER CARRIER BY INCORPORATING IN SAID CERTIFICATE A CLASSIFICATION OF WATER CARRIERS

The Interstate Commerce Commission, as noted under the preceding heading, is not authorized to revoke or cancel a certificate issued to a water carrier under part III of the act after the certificate has become effective and in force. This limitation on the power of the Commission is due to the fact that Congress did not include a section providing for revocation of certificates in part III of the act as it did in part II of the act. Under this section of the brief the right of the Commission to accomplish by indirect means the same result which it is denied by direct means; i.e. partial revocation of an outstanding certificate by incorporation of a classification of water carriers, will be discussed.

Appellant contended before the Commission and before the District Court that incorporation in an outstanding certificate of a classification of water carriers either by reference or by interpretation has the same effect as an outright modification or revocation of the certificate. The Commission did not pass on this question. The District Court held that the Commission has the power to classify water carriers and thereafter to limit the services to be rendered by water carriers pursuant to such classification. In reaching this conclusion the District Court did not answer the contention of appellant that illegal revocation of a certificate under these circumstances would result. The District Court merely concluded that the Commission has the right under section 304(c) of part III of the Interstate Commerce Act to classify water carriers. This authority is not disputed by appellant. Appellant is aware that the Commission has in numerous instances specifically authorized water carriers to engage in a towing operation. On the other hand, appellant points out that the Commission has in many instances granted certificates to water carriers which did not specify the type of service to be rendered (in fact, the authority of the Commission to specify service to be rendered in a water certificate will be questioned under the next heading).

Section 304(c) of part III of the act is practically identical with section 204(b) of the act applicable to motor carriers. Both sections authorize the Commission to classify carriers of property as to type of carrier, type of service, and type of commodity transported. Pursuant to this authority the Commission in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, established various types of carriers and classes of commodities transported by motor carriers. That proceeding was conducted by the Commission in the beginning of its administration of part II of the Interstate Commerce Act and thereby has been a guide for all concerned. On the other hand, the Com-

mission has not seen fit to institute a similar proceeding concerning water carriers. Instead its classification of water carriers has been on a case to case basis and in many instances after a certificate was outstanding.

The Commission in its administration of part II of the act applicable to motor carriers has also been very careful not to in effect revoke a certificate of a motor carrier by incorporating a classification order in an outstanding certificate. This caution has been exercised even though the Commission has express statutory authority to revoke a certificate of a motor carrier. An outstanding example of the Commission's action in this regard is the case of *Coastal Tank Line, Inc. v. Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. In this case Charlton Bros. held a certificate from the Commission authorizing the transportation of general commodities with certain exceptions. The certificate did not prohibit the right to transport petroleum products, in bulk, in tank trucks. This special type of operation had been classified by the Commission in its earlier *Classification* case as a separate and distinct type of operation and as a result the Commission consistently thereafter excluded such authority from newly issued certificates unless the carrier specifically proved that it had engaged in that type of operation on and since the grandfather date applicable to motor carriers.

The certificate of Charlton Bros. authorized the transportation of general commodities but no mention was made of the right to transport petroleum products, in bulk, in tank trucks. Several years later Charlton Bros. for the first time undertook the transportation of petroleum products in tank trucks in competition with existing carriers whose operations were confined entirely to that type of service. A complaint by Coastal Tank Line and others was filed with the Commission. The complainants contended that it was understood and recognized in the motor carrier field that bulk transportation with tank

trucks was a separate and distinct type of service and, therefore, that the Commission's action in the *Classification* case had nullified the right of Charlton Bros. to transport petroleum products. Charlton answered this contention with the argument that the incorporation of the *Classification* case holding in its certificate would constitute a partial revocation, an action to be taken only within the framework of section 212 of the act applicable to the revocation of motor carrier certificates. The Commission agreed with Charlton, stating as follows:

> "The definition of commodity groups in the *Classification* case hardly can have greater significance when they are not referred to in the certificate." (48 M.C.C. 305)

The Commission further held that variations in certificated operating authority, if dependent on the classification of motor carriers or on the basis of matters antecedent to the issue date of a certificate, would lead to instability in the motor carrier industry and uncertainty among the patrons as to the operating rights of motor carriers. The Commission went so far as to hold that the complainant's position could be sustained only if the certificate had excluded the rights to transport petroleum products in bulk in tank trucks at the time it was issued, finding however that "they were not and we may not now by interpretation, so modify the certificate" (48 M.C.C. 302). Thus, the *Charlton Bros.* case holds that the Commission may not incorporate a classification of motor carriers by reference or interpretation in an outstanding certificate which would have the effect of partial or complete revocation. The Commission recognized in this case that the scope of operations set forth in the certificate constitutes the authority of the carrier and that the certificate cannot be whittled away by interpretations or incorporation by reference of classifications which were not prescribed in the certificate at the time of its issuance.

The complainant in the *Charlton* case filed an action in the United States District Court for the District of Columbia to set aside the Commission's order. That Court on February 10, 1953 upheld the Commission's order and dismissed the complaint. (*Coastal Tank Line, Inc., et al* v. *United States of America, et al*, No. 2271-50). This decision gives judicial recognition of the Commission's decision in the *Charlton* case that a particular type of operation created for classification purposes may not be prohibited unless the carrier's certificate is specifically restricted. This decision is in conflict with the decision of the District Court in the instant case in that the District Court herein has justified a curtailment in operating authority under a classification order not included in the certificate or referred to therein.

Appellant contends that the Commission may look only to the certificate of the carrier, whether water or motor, to determine the scope of the authority of the carrier. In this case appellant is authorized even under its present certificate to transport general commodities with the use of non-self-propelled vessels (scows and barges) and separate towing vessels (tugs). This certificate does not state that the tugs may be used in a particular manner nor does it state that the barges may or may not be used in a particular manner. There is no reference in the certificate to any classification of water carriers nor is there any reference to the type or character of service which may be rendered other than as a common carrier. The legal authority conferred by the certificate may not be restricted by reading into that certificate a classification which is not referred to therein. Appellant submits that such action is no less a revocation of a certificate than direct action under section 212 for a motor carrier action not authorized under part III. If the Commission's authority to act as it has in this case is upheld the door will be open for similar action in the future. There would be no

limitation in that event on the Commission's right to establish other classifications of water carriers and thereafter to hold that carriers are without authority to engage in that particular type of service unless their certificates specificaly authorize such a service.

The *Charlton* case is not the only one in which the question of the Commission's authority to interpret certificates already issued to motor carriers has arisen. In *Campbell Sixty-Six Express, Inc.* v. *Frisco Transportation Company, et al.*, 46 M.C.C. 222, the defendant was charged with conducting an unauthorized operation. In deciding in favor of the defendant, the Commission held:

> "Section 208(a) of the act requires that any certificate issued under section 206 or 207 shall specify, among other things, the service to be rendered, and *motor common carriers and others interested are not required to go back of the certificates to determine the nature and extent of the service authorized.* Here we may look only to the certificates held by the transportation company to determine whether it is engaging in unauthorized operations" (Emphasis supplied).

In the *Campbell Sixty-Six* case, the Commission specifically recognized its limitations in going back of a certificate for interpretation purposes. Its acknowledged limitation that it "may look only to the certificates held by the transportation company to determine whether it is engaged in unauthorized operations" is the very same limitation which the Commission refused or failed to acknowledge in this case. The certificate of a carrier, be it a water carrier or a motor carrier, is the only instrument the Commission may refer to in resolving the question of legality or illegality of a particular operation.

In *Glendenning Motorways, Inc., Interpretation of Certificate*, 49 M. C. C. 440, the Commission was called on again to interpret a certificate issued under part II of the

act. This case involved the right of the carrier to use its certificate in a manner just as the instant case involves the right of appellant to use its certificate in a certain manner. In the *Glendenning* case, the Commission held that:

> "Clearly, we cannot as the complaining carriers would have us do, go back of the certificate and cut it down by restriction on the theory that it grants too much. A certificate granting certain rights including those described above, is outstanding and has been since December 30, 1946, and there is no evidence that the issuance thereof was through fraud or inadvertence."

Tidewater Transfer Company, Inc. Extension, Wines in Bulk, 47 M.C.C. 279, involved a certificate issued after Commission's decision in the *Classification* case wherein it was held that carriers of liquid petroleum products are engaged in a special service requiring the use of special equipment. This certificate was issued to the carrier without restriction as to the method or manner in which malt beverages or wines could be transported. In upholding the carrier's authority to engage in this specialized service the Commission said:

> "To hold now that applicant's unrestricted permit does not include the right to transport wines in tank vehicles would be reading into the permit a condition or limitation which does not exist and which would have the effect of a partial revocation of applicant's permit without benefit to it of the procedure provided in section 212(a) of the Interstate Commerce Act, as amended."

Here again the Commission refused to read into a motor carrier operating authority a restriction resulting from the *Classification of Motor Carriers* case, which was not incorporated or referred to in the certificate on the theory that such a restriction would constitute a partial revocation.

In *Valley Motor Lines, Inc.* v. *Western Truck Lines, Ltd.*, 47 M.C.C. 718, the Commission refused to amend or modify an outstanding certificate rejecting the contention of the complainant that the defendant did not have the authority to perform a certain service. In *Hudson Bus Transportation Company, Inc. Common Carrier Application*, 46 M.C.C. 9, the Commission held that a certificate which had become final and effective was conclusive because "any other conclusion would result in uncertainty on the part of certificate holders concerning the finality of their operating authorities" (p. 15).

In *Mutrie Transp., Inc. et al* v. *Blue Line Exp., Inc.*, 53 M.C.C. 530, the Commission held that:

> "The sole criterion of the extent of defendant's authority is the terms of the certificate, and it is immaterial whether defendant's predecessor intended to transport fuel oil at the time he filed his 'grandfather' application" (p. 533).

In *Detroit & Cleveland Navigation Company*, 265 M.C.C. 506, involving a water carrier, the Commission held that once a certificate has become effective it is without authority to disturb it. The Commission referred to the *Seatrain* case, *supra*, in justification of its holding that it is without authority to revoke or limit the operating rights granted to a water carrier.

In *Brady Transfer & Storage Company Extension*, 51 M.C.C. 770, the Commission held that it is neither necessary nor proper to implement a certificate by interpretation where the operating authority described therein is described in clear, unequivocal and unambiguous language. The certificate under review in the *Brady* case was upheld and the service in question was found to be authorized.

In summary the foregoing cases support appellant's position that no clearer case of revocation or modification of a certificate of a water carrier has been created than

by the failure of the District Court to set aside the Commission's order. This result would be accomplished by the Commission regardless of the fact that it does not have the right to modify or revoke certificates, and, in fact, it is seeking that right from Congress by amendment to part III of the Interstate Commerce Act. In its Sixty-Sixth Annual Report to Congress dated November 1, 1952, the Commission stated at page 137:

> "In each of our annual reports beginning with that for 1947, we recommended that part III of the act be amended by adding provisions for revocation of water-carrier operating authorities. The need for such authority was discussed at pages 50-51 of the report for 1949. That need still exists, and we are again recommending that part III be amended by adding after section 312 a new section 312a containing provisions for revocation of water-carrier certificates and permits."

In the same report the Commission recommended legislation by amendment of part III of the act "by adding after section 312 a new section (312a) containing provisions for revocation of water-carrier certificates or permits" (p. 147).

III

THE DISTRICT COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE COMMISSION IS NOT AUTHORIZED TO SPECIFY THE SERVICE TO BE RENDERED OR THE TYPE OF EQUIPMENT TO BE USED BY A WATER CARRIER.

Appellant has contended before the Commission and the District Court that the Commission is not authorized under part III of the Interstate Commerce Act to specify the service to be rendered or the type of equipment to be used by water carriers. The support for this argument

is the language of section 309(d) and this Court's decision in the *Seatrain* case, *supra*. The District Court held that this limitation could not operate to authorize an expansion of operations beyond the grandfather rights set out in section 309(a) of the act or the classification authorized by section 304(c) of the act. Appellant submits that there is no expansion of the grandfather rights of its predecessor in interest because its certificate, both original and as revised, does not permit an operation greater than the Commission intended to authorize.

The District Court's reference to section 304(c) having to do with classification of carriers has been dealt with under the preceding heading where it was shown that such a classification is ineffective to restrict a certificate issued without regard to such classification.

In the *Seatrain* case this Court compared the provisions of section 208(a) of the act applicable to motor carriers with the provisions of section 309(d) of the act applicable to water carriers. Section 309(d) of the act provides, among other things, that the Commission shall not impose any limitation or condition so as to restrict the right of the carrier to add to its equipment, facilities or service within the scope of its certificate as the development of its business and the demands of the public shall require. A similar provision is contained in sections 208(a) applicable to motor carriers. However, under section 208(a) the Commission is directed to specify the service to be rendered in any certificate issued under part II of the act, whereas that provision is missing under section 309(d) of the act applicable to water carriers. This Court recognized that very significant difference in the details of the Commission's authority to regulate the service of a motor carrier and a water carrier. In the *Seatrain* case it was noted specifically that section 309, "which empowers the Commission to grant certificates to water carriers does not authorize the Commission to specify 'the service to be

rendered' ". This Court also observed that section 309(d) referred to above would seem to preclude the Commission from incorporating any term or condition in a certificate which would deprive the public of the best type of service which a water carrier could render. This Court concluded that:

> "In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this respect are not controlling as to the Commission's power to regulate the details of the service of water carriers" (329 U.S. 431, 432).

If the Commission is not authorized to specify the service to be rendered by a water carrier in a certificate issued under part III of the act, as was held by this Court in the *Seatrain* case, it necessarily follows that the Commission is without authority to deny appellant the right to engage in all types of common carrier operations. Furthermore, since the Commission derives its right to specify the type of equipment a motor carrier may use solely from its right to specify the service of a motor carrier, the absence of that right under part III would necessarily preclude the right to specify equipment to be used.

The Commission has authorized motor carriers to engage in a particular type of operation in a certificate issued under part II of the act. Similarly, it has prohibited motor carriers from engaging the certain types or classes of motor carrier operations. The Commission has predicated its authority in that regard solely on its right to specify the service to be rendered under part II of the act in certificates issued to motor carriers. For instance, in *Eastern Trails, Inc. Common Carrier Application*, 42 M.C.C. 21, 25, a motor carrier was denied the right in a certificate issued it by the Commission to

engage in a mass transportation type of service as distinguished from a long distance or trunk-line service. In justifying its action in restricting the carrier to a particular type of service the Commission referred to its authority under section 208(a) of part II of the act, stating:

> "The restriction recommended by the examiner which would prevent applicant from 'affording local service' between Newark and New York City is solely a limitation on the service which Eastern Trails, Inc. may render."

If the Commission has the right under part II of the act to prohibit a carrier from engaging in a particular type of service because of the right to specify the service to be rendered, it necessarily follows that the same right cannot be exercised under part III of the act when the same or similar provisions have not been incorporated in part III. The absence of the provision with respect to specification of service in part III is just as pertinent as the absence of the right to revoke a certificate in part III. This Court held in the *Seatrain* case that its decisions relating to the Commission's power to regulate the details of motor carrier service are not controlling as to the power of the Commission to regulate similar details of water carriers. In *Crescent Express Lines* v. *United States*, 320 U. S. 401, it was contended that the Commission's action in restricting a certificate issued to a motor carrier to the use of certain types of vehicles was contrary to the statute and illegal. This Court, however, held that:

> "Since section 308 (208 of the Interstate Commerce Act) requires the Commission to specify the service to be rendered, this could not be done without power to also specify the particular type of equipment to be used."

In view of this Court's decision in the *Crescent* case appellant submits that the Commission may not specify

the equipment to be used by a water carrier because it does not have the right to specify the service to be rendered.

It will be recalled that the original certificate of July 17, 1942 of appellant's predecessor in interest did not specify the equipment to be used. After the first certificate was cancelled or revoked a second certificate was issued to appellant's predecessor on March 7, 1944, which specified the equipment to be used as self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. Irrespective of the contentions advanced under point I regarding the validity of the Commission's action in revoking the earlier certificate and substituting the certificate of March 7, 1944, appellant, as a further point, here contends that the Commission lacked statutory authority to specify the equipment to be used by the carrier because of the absence of authority to specify the service to be rendered which this Court held in the *Crescent* case is essential if equipment is to be specified. If the Commission may not specify the equipment to be used, appellant would be free, even under the Commission's interpretation as to classification of carriers, to operate in any manner it may choose to as a common carrier.

As noted, the Commission itself has recognized in a long line of decisions that its right to restrict an operation authorized in a motor carrier certificate to the use of certain types of equipment comes solely from its right under part II of the act to "specify the service to be rendered" in a motor carrier certificate. In *Nudelman Common Carrier Application*, 22 M.C.C. 275, Division 5 of the Commission first held that it was without authority to specify the type of vehicles to be used by a motor carrier. Upon further consideration, 28 M.C.C. 91, 93, Division 5 of the Commission reversed itself, holding:

"We are of the opinion that our prior construction of section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered' ".

The Division said further:

"In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitation to the quantity of the service to be rendered."

In conclusion it was stated:

"Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles *in describing the particular service to be rendered* under the authority granted." (Emphasis supplied)

The *Nudelman* case, involving a motor carrier certificate, holds specifically that because of the Commission's authority to "specify the service to be rendered," it necessarily has the right to specify the use of certain types of vehicles. In *Miller Extension of Operations*, 21 M.C.C. 401, the Commission granted a certificate restricted to the use of tank trucks. In *Myers Common Carrier Application*, 21 M.C.C. 451, a certificate was restricted to the transportation of automobiles in driveaway service. In *Central Truck-Away System, Inc.*, 17 M.C.C. 713, the certificate was restricted to truck-away service. In *Parcel Delivery Service, Inc.*, 8 M.C.C. 275, the authority granted therein was restricted to merchandise transported in "motorcycle traffic cars, with panel bodies". In *Billy Baker Company Common Carrier Application*, 24 M.C.C. 805, the authority granted was restricted to the use of dump trucks. In *Barrows Common Carrier Application*, 19 M.C.C. 179, the authority therein granted was restricted to the transportation of not more than six passengers per trip. In *Mercer and Dunbar Common Carrier Application*, 13 M.C.C. 683,

the authority was restricted to an armored truck operation. In *Smoky Mountain Tours Company*, 27 M.C.C. 435, the applicant was precluded from using open-top equipment.

The foregoing discussion raised the question of the Commission's statutory authority to specify the service which appellant may or may not render and the type of vessels it may or may not use. It is the contention of appellant that the Commission has exceeded its statutory authority and, therefore, a reversal by this Court of the District Court's holding is required to prevent an unauthorized assumption of power by the Commission. As is well known, the Commission is a creature of Congress. It derives its authority from Congress and may exercise only such powers as are provided for in the statutes. Since the beginning of the Interstate Commerce Act, the courts have been called on numerous times to prevent the Commission from extending its control or jurisdiction over carriers in a manner not provided for by statute. This Court has on numerous occasions seen fit to set aside or invalidate an order of the Commission. For instance, in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, the Commission contended it had the right to prescribe rates for the future. This Court held otherwise because there was no specific grant of power in the statute. In *U. S.* v. *Pennsylvania R. Co.*, 242 U. S. 208, this Court held that the Interstate Commerce Commission was given no power to order a carrier to provide and furnish its shippers tank cars for interstate shipments of petroleum products. In *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, this Court held that the Commission was not authorized to permit abandonment of an intrastate railroad, because this authority was not plainly intended, and the Commission's action had "a wider operation and effect than can be given to it consistently with the provisions of the act" (page 218). In

Peoria & P. U. R. Co. v. *U. S.*, 263 U. S. 528, this Court held that an order of the Commission requiring one carrier to switch cars for another was invalid because there was no authority in the act granting that power to the Commission. In *U. S.* v. *Missouri P. R. Co.*, 278 U. S. 269, this Court held that the Commission was not authorized by the Interstate Commerce Act to establish all the through routes it may deem necessary or desirable in the public interest. It held:

> "It is elementary that where no ambiguity exists there is no room for construction. Inconveniences or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation" (page 277, 278).

In *St. Louis O'Fallon R. Co.* v. *U. S.*, 279 U. S. 461, this Court held that the Commission must follow the mandate of Congress in fixing values and its failure to do so constitutes grounds for reversal. The Court held that "the only power to make any recapture order arose from the statute" (page 488). In *Ann Arbor R. Co.* v. *U. S.*, 281 U. S. 658, this Court held that the Commission incorrectly construed a joint resolution of Congress, authorizing the reduction of certain rates. The Commission's action therefore exceeded its statutory authority. In *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627, this Court found that the Commission had assumed a power not granted to it by Congress and "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts" (page 640). This finding is certainly applicable in the case before this Court as the Commission has plainly exceeded its statutory power and has assumed authority not granted to it by the statute. Accordingly, "no amount of such interpretation"

is binding on this Court as to the Commission's power to act as it did.

In *Baltimore and O. R. Co.* v. *U. S.*, 298 U. S. 349, this Court held that an order of the Commission "if shown to rest on a misconstruction of the act" (p. 359) may be annulled. In *U. S.* v. *Idaho*, 298 U. S. 105, this Court held that an order of the Commission permitting abandonment of a "spur" line was in excess of its jurisdiction and therefore should be set aside.

This Court is urged to find as a matter of law that the Commission may not specify the service to be rendered by a water carrier in a certificate issued under part III of the act. This limitation necessarily prohibits the Commission from denying a carrier the right to operate in any manner it chooses as a common carrier. Moreover, this Court is requested to hold as a matter of law that the Commission may not specify the equipment to be used by a water carrier. Such a holding would have the effect of restoring the certificate of July 17, 1942 of appellant's predecessor.

IV

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE COMMISSION'S ORDERS HAVE THE EFFECT OF REVOCATION OR MODIFICATION OF SECTION 314 OF THE INTERSTATE COMMERCE ACT

This case had its beginning at the time appellant filed a tariff with the Interstate Commerce Commission providing for allowances to be made to shippers if scows were furnished to appellant for use in transportation of brick. The operation of these allowance provisions is described in the Commission's report of October 18, 1951 (R. 27-28).

These allowance provisions are specifically recognized and contemplated by section 314 of part III of the act.

Section 314 of the act provides in substance that if the owner of property transported by a water carrier directly or indirectly furnishes any service connected with such transportation or furnishes any instrumentality used therein, the charge or allowance therefor shall be published in tariffs or schedules. These charges or allowances shall be no more than are just and reasonable. Section 314 of the act dealing with allowances provides that the Commission may determine the maximum reasonable charge to be paid by a carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.

Under the provisions of section 314 a water carrier may make provisions for such allowances in a tariff and the Commission's only jurisdiction over these allowances is to determine whether or not the level of the allowances is just and reasonable. The question for decision under this heading, therefore, is whether or not the Commission should be allowed to in effect destroy or revoke the allowance provisions of section 314 by requiring compliance with one of its rules or orders which is in conflict with the allowance provisions of the act. In other words, if a conflict is created between a provision or section of the Interstate Commerce Act and an order or rule of the Commission, which will control or take precedence? It is the contention of appellant under these circumstances that the provision of the act must prevail over an order or regulation of the Commission, for otherwise the Commission would be at liberty to modify, suspend, change or alter any part of the Interstate Commerce Act at its will or pleasure merely by the promulgation of a rule or order.

Appellant has contended that the requirements of the Commission's order as to the circumstances under which equipment of a shipper may be used are impossible of compliance if the allowance provisions of the act are to

be recognized. In its decisions, the Commission has allowed carriers such as appellant to use the equipment of shippers so long as the carrier uses the shippers' facilities as a part of its own equipment (R. 32). It was concluded by the Commission that appellant did not use the scows of its shippers as a part of its own equipment because (1) appellant's rates provided for the return of shippers' scows light to point of origin, (2) its published rules with respect to free time and demurrage are inapplicable when scows are furnished for shippers, and (3) that appellant may not load a shipper's scow for a return movement in lieu of returning the vessel light to its owner at origin. From these facts the Commission concluded that appellant was not using shippers' scows as a part of its own equipment and, therefore, the allowance provisions of the act could not apply. The effect of this order will prohibit entirely the publication of allowances by water carriers operating under certificates such as appellant's for the reason that it is impossible for such carriers to comply with the Commission's order and still remain within recognized allowance practices. The Commission, therefore, has brought about a result which it has condemned in the past. In *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 471, the Commission recognized that:

> "In the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under general circumstances would warrant the assumption of such power (modification of a separate provision of the act) through our own construction of the act."

Allowances have been recognized for years in the field of transportation. In an early case dealing with this subject this Court held in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 41, 46-47, as follows:

> "The act of Congress in terms contemplates that if the carrier receives services from an owner of prop-

> erty transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint. As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

The above case recognizes that carriers such as appellant are required to furnish equipment upon request of a shipper and that there is nothing to prevent a carrier from hiring equipment rather than owning it. That is all appellant has proposed to do under the allowance provisions of its tariff which have been condemned by the Commission.

The Commission predicated its conclusion on an earlier decision in the case of *Dixie Carriers, Inc., Rates and Allowances,* 278 I.C.C. 417. In that case the Commission acknowledged the confusion which had existed in its own decisions as to the difference, if any, between towage service and general freighting service. It was acknowledged at one time that a carrier which had authority to perform general freighting service could also perform towage service. However, at a later date in the *Campbell Transportation Co.* case, *supra,* the Commission decided that a distinction existed between towage service and general freighting service. In the *Campbell* case, the Commission held specifically that "a carrier authorized to engage in the transportation of commodities generally by non-self-propelled facilities with the use of separate towing facilities is not prohibited from using shippers' barges as a part of its equipment in performing such complete freighting service, provided the allowances for such use are reasonable and otherwise lawful". Nevertheless, the Com-

mission found in the *Dixie Carriers* case that the carrier therein could not publish equipment allowances. One of the three commissioners in that case dissented on the ground that the Commission's duty under section 314 was to determine what would be a reasonable charge as a maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished and to fix the same by appropriate order. This is the same limitation which this Court recognized in the *Diffenbaugh* case, *supra*, as the Commission's only power or authorization. Instead, however, the Commission in the *Dixie Carriers* case and in this case proceeded to decide the issue squarely on the question of whether or not the new policy announced in the *Campbell* case as previously referred to would take precedence over the provisions of the Interstate Commerce Act. The Commission's action in that regard is invalid and unlawful as it constitutes an unauthorized exercise of power not authorized by the act.

Equipment allowances in the transportation field are not matters of recent origin. Railroads have followed that practice for many, many years. These carriers have published allowances for the benefit of shippers for the use of certain types of equipment in connection with transportation. Tank cars, coal cars, fruit cars, cattle cars and other types of railroad cars have been owned by shippers but used by the railroads since almost from the beginning of the Interstate Commerce Act in 1887. Equipment allowances as a part of the transportation facility are as much a part of the scheme of transportation as is the solicitation or transportation of freight. However, the Commission in this case proposes to disrupt this long established practice and procedure for the sole purpose of protecting an earlier order where a distinction was made between towage and freighting.

The record in the case before the Commission shows that during the 1950 shipping season appellant operated under its complete supervision, control and jurisdiction, a minimum of sixteen barges and scows and a maximum of twenty-nine barges and scows. This equipment was available to appellant's shippers at all times during the 1950 season. An exhibit of record indicates that at least twenty-eight movements were made during 1950 for brick shippers with scows furnished by appellant for which no allowance was made. Appellant was ready, willing and able at all times to furnish its shippers with scows had that request or demand been made upon it. However, some of its shippers did not see fit to avail themselves of the equipment of appellant. Instead, since they already owned suitable equipment, these shippers used their own equipment under the published tariff allowances of appellant. The Commission, however, criticized appellant because of the preference of its shippers for using their own equipment rather than the equipment which appellant had available for them.

It is emphasized that the tariff provisions of appellant regarding allowances are available to all shippers without discrimination. Similarly, all shippers desiring appellant's service may require it to furnish equipment for their transportation needs. This requirement must be observed by any carrier for otherwise the carrier would be placed in a position of offering its equipment to one group or class of shippers for transportation and, at the same time, denying equipment to other shippers. This practice would certainly constitute unlawful discrimination.

It cannot be disputed that a carrier has the right to furnish transportation facilities to a shipper or to allow the shipper to furnish the facility itself if the arrangements therefor are covered by tariffs on file with the Commission and available to all alike. There is no viola-

tion of law when a shipper is given reasonable compensation out of the freight rate paid to the carrier under these circumstances. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247. The only limitation is that the amount of the allowance must be reasonable. *Union Pac. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215. In the *Diffenbaugh* case, *supra*, the Supreme Court held allowances to grain elevators to be proper so long as free from discrimination. In *U. S.* v. *Louisiana & P. R. Co.*, 234 U. S. 1. the Supreme Court reversed an order of Commission and held that tap-line allowances were legal. In this case, the Supreme Court held:

> "We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves." (p. 28)

The Court recognized that the Commission's only authority in such cases would be to reduce the divisions of joint rates as would amount to rebates or discriminations so that the tap-line would receive only just compensation for what it actually did. The same principle is applicable in this case. The Commission is without authority to outlaw entirely the allowance provisions of appellant's tariff. Its only right under the statute, as was recognized by one of three commissioners in the *Dixie Carriers* case, *supra*, is to determine whether or not the allowances are just and reasonable and the maximum amount to be paid by the carrier for facilities furnished by a shipper.

The plain fact of the matter is that the Commission did not reckon with the allowance provisions of section 314 when it attempted to establish a distinction between towage and freighting in the *Campbell* case. The matter of towage is a creature of the Commission's own creation. This type of service does not exist under part I of the act applicable to railroads, or under part II of the act applicable to motor carriers. Nevertheless, under part III

of the act applicable to water carriers, the Commission would impose a new and strange regulation which is in direct conflict with section 314.

In summary, appellant urges the court to recognize that the Commission's order is predicated on its desire to enforce its distinction between freighting and towage. In so doing the Commission has effectively modified or revoked the provisions of section 314 by setting up certain standards which are impossible of compliance by a carrier and still remain within the recognized allowance practices. If the requirements of the Commission were carried out there would be no necessity of a carrier granting an allowance to a shipper simply because a carrier could lease or charter equipment and have the full right of operation and control over it to the exclusion of the shipper. This is why appellant contends that section 314 under these circumstances insofar as a water carrier operating under a certificate permitting a freighting service is concerned would have been modified or revoked. Under these circumstances and particularly in the light of the decisions of this Court that allowances are lawful, appellant should be afforded the privilege of making a reasonable allowance to shippers for furnishing a part of the transportation facility.

V

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION DID NOT OBSERVE THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT

Appellant contended in the District Court that the Commission's orders complained of were invalid by reason of the fact that the provisions of section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) had not been observed. Appellant contended specifically in the District Court that the Commission had not made findings

and conclusions concerning several relevant and material issues. The District Court held that the Commission's findings were complete and adequate. Such findings, however, considered only the question of towing versus freighting, which was the only issue the Commission elected to discuss in its report. The position of appellant under this heading is not directed to the adequacy or inadequacy of the Commission's findings regarding the sole question which the Commission elected to discuss but rather the position of appellant is directed to the failure of the Commission to make findings and conclusions regarding other material issues presented on the record which in appellant's opinion were far more important than the sole issue selected by the Commission for consideration.

Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007(b)) requires an administrative agency such as the Commission to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof". The same section requires an administrative agency such as the Commission to include in the record "the ruling upon each such finding, conclusion, or exception presented". It is also provided that:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof".

In the pleading filed by appellant for interpretation of its status and for formal disposition of the complaint of a competing carrier, it was specifically prayed that the

Commission find that the allowance provisions contained in appellant's tariff were just and reasonable. Appellant further prayed that the Commission determine that it is, under its certificate, "legally authorized to publish and observe such (allowance) provisions in its relations with its shippers."

Subsequent to the hearing, appellant filed a brief with the Commission, exceptions to the report proposed by the examiner and a petition for reconsideration of the report of Division 4 of the Commission. Appellant has persistently advanced certain legal arguments and propositions of law in support of its position that it is legally authorized under its certificate to engage in the type of operation it is conducting on the Hudson River and to publish allowances in its tariff applicable in instances where shippers furnish a part of the transportation facility. The examiner ignored these arguments entirely in his proposed report. Division 4 listed the propositions advanced by appellant at sheet 2 of its report of October 18, 1951 (R. 22-23) and thereafter promptly proceeded to ignore or disregard those propositions of law. Other than vague inferences which have been referred to in this brief as to the Commission's reactions to these arguments, the findings of the Commission are barren of the required rulings, findings and conclusions upon material issues presented by Appellant in the case before the Commission. Otherwise stated, the Commission confined its consideration to matters of convenience to it and chose to ignore the principles of law which appellant believes are contrary to the Commission's conclusions.

From the foregoing discussion, it is readily apparent that section 8(b) of the Administrative Procedure Act requires the Commission to set forth its rulings upon all of the requested findings, conclusions or exceptions presented in the record. The Commission's statement in its report decided October 18, 1951 that "exceptions and re-

quested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified" (R. 23) cannot satisfy this requirement because the Court is unable to determine the basis of the Commission's decision. This type of avoidance on the part of the Commission was definitely in the mind of Representative Walter of Pennsylvania when he stated on the floor of the House of Representatives of the United States Congress on May 24, 1946,[1] as follows:

> "The second subsection of section 8 is a statutory statement of the right of the parties to submit for the full consideration of the presiding officers, first, proposed findings and conclusions, or second, exceptions to recommended decisions or other decisions being appealed or reviewed administratively and, third, supporting reasons for such findings, conclusions, or exceptions. The record must show the official ruling of the agency upon each such finding, conclusion, or exception presented. These provisions assure all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case. So that the parties and the reviewing courts may be fully apprised, all recommended of other decisions must include first, findings and conclusions, as well as the reasons or basis therefor, upon all the issues of fact, law, or discretion presented by the record and, second, the appropriate agency action or denial.
>
> The purpose and effect of these provisions are clear upon the fact of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusions will be determined by the record and by the legal, factual, or discretionary issues raised by the parties. The mere parroting of findings or

[1] Legislative History, Administrative Procedure Act, Senate Document No. 248, 79th Congress, 2d Session, page 367.

conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

The District Court's opinion appears to be in conflict with the opinion of a Three-Judge Statutory Court in the case of *Atlanta and St. Andrew's Bay Rwy.* v. *United States*, 104 F. Supp. 193. In that case it was held specifically that section 8(b) of the Administrative Procedure Act is applicable to the Interstate Commerce Commission. In this case the District Court's decision overlooks the requirement that the Commission shall include a statement of findings and conclusions as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record. Under this provision the Commission has no alternative but to make these findings and conclusions, and its failure to do so conflicts with the provisions of section 8(b) of the Administrative Procedure Act.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court below should be reversed, and that the order of October 18, 1951 of the Interstate Commerce Commission as affirmed by order of March 17, 1952 should be ordered vacated and set aside.

Respectfully submitted,

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March, 1953